

August 22, 2007

Ms. Beth O'Donnell
Executive Director
Public Service Commission of Kentucky
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RECEIVED

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PUBLIC SERVICE
COMMISSION

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Re: *Commonwealth ex rel. Stumbo v. Public Service Commission*,
Civil Action No. 06-CI-00269 (Franklin Circuit Court)
Comments on Surcharge Issue

Dear Ms. O'Donnell:

This letter is offered on behalf of BellSouth Telecommunications, Inc., d/b/a AT&T Kentucky, AT&T of the South Central States, LLC, TCG Ohio, SBC Long Distance, LLC, d/b/a SBC L.D., d/b/a AT&T L.D., Cincinnati Bell Telephone Company LLC, Windstream Kentucky East, Inc., Windstream Kentucky West, Inc., and Windstream Communications, Inc. ("Telecommunications Providers") in response to the Commission's request for comments regarding the Commission's course of action with respect to surcharges pending the final resolution of *Commonwealth ex rel. Stumbo v. Public Service Commission*, Civil Action No. 06-CI-00269 (Franklin Circuit Court).¹ The Telecommunications Providers recommend the Commission maintain the status quo by continuing to administer all surcharges in accordance with existing practice. This approach gives full legal effect to the Franklin Circuit Court's August 1, 2007 Opinion and Order and avoids the adverse consequences that otherwise would befall certain of the programs offered by the Telecommunications Providers, Kentucky ratepayers, and the Telecommunications Providers should the Commission abandon its present administration of surcharges.

A. The Legal Effect of the Franklin Circuit Court's Opinion and Order.

The only surcharge before the Franklin Circuit Court in *Stumbo v. Public Service Commission* was Union, Light, Heat and Power Company's (n/k/a "Duke Energy") Accelerated Mains Replacement Program Rider ("AMRP Rider"), and the only Commission orders before the court were those granting Duke Energy the right to impose the surcharge and approving the subsequent adjustments. This fact is made clear in both Attorney General's complaint upon

¹ AT&T of the South Central States, LLC and SBC Long Distance, LLC, d/b/a SBC L.D., d/b/a AT&T L.D. are filing comments only with respect to their non-IXC operations.

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appeal, which was limited in scope to a challenge of Duke Energy's AMRP Rider, and in the court's Opinion and Order, which provided the following, narrowly-tailored relief:

Absent statutory authority for an interim review and surcharge, *the cost of the AMRP* must be considered in the context of a rate case . . . Accordingly, *the final administrative order of the Public Service Commission* is REVERSED and *this action* is REMANDED to the Public Service Commission for further proceedings not inconsistent with this judgment.

Simply stated, the court's Opinion and Order applies only to Duke Energy's AMRP Rider and it should not be construed to have any impact on any other surcharges or any other utilities.

The Telecommunication Providers' position on this issue finds support from the general maxim that a court has the authority to decide only the issues squarely before it (and even then only as to the parties to the action),² and the equally long-standing recognition that broad statements of general legal principles, such as the Franklin Circuit Court's statement that "the PSC may not allow a surcharge without specific statutory authorization," are not binding beyond the particular facts of the case in which they are made. Kentucky law is well-settled that such expressions should be read in the context of the case in which they are made, and should not control the judgment in subsequent actions addressing similar issues.³ That is, any findings or statements made by the court in *Stumbo v. Public Service Commission* should not be read to have controlling legal effect beyond the parties and the specific surcharge at issue in that case, including as to whether the Telecommunications Providers can continue assessing certain other surcharges.

Further, the Franklin Circuit Court's Opinion does not address the Commission's express statutory authority to adjust rates outside the confines of a general rate case, focusing instead on whether the Commission enjoys the "inherent authority" to implement single item rate adjustments. KRS 278.180 and 278.190 clearly provide the Commission with the authority to adjust applicable utility rates, and nowhere limit the scope of the authority to a general rate case in which all revenues and costs are examined and all rates are subject to adjustment. The statutory grant of authority to adjust applicable rates is unambiguous, and language limiting the exercise of this authority only to general rate cases should not, and can not, be read into the statutes. The Commission should not abandon its broad authority to adjust applicable, non-alternatively regulated rates by the means it finds appropriate absent statutory direction from the General Assembly or a final and nonappealable decision of a court of competent jurisdiction directly holding that no such authority exists.

² *Matthews v. Ward*, 350 S.W.2d 500, 501-502 (Ky. 1961).

³ See, *Louisville Water Company v. Weis*, 25 Ky. L. Rptr. 808, 76 S.W. 356 (1903) (citing *Cohens v. Virginia*, 6 Wheat 264, 5 L.Ed. 257 (1821)).

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B. The Telecommunications Providers' Surcharges.

For the reasons set forth above, the Telecommunications Providers believe that none of their surcharges are impacted by the Franklin Circuit Court August 1, 2007 Opinion and Order. In order to assist the Commission with its information gathering, the Telecommunications Providers offer the following as a list of their surcharges potentially at issue: (1) Kentucky Lifeline Support;⁴ (2) Telecommunications Relay Service and Telecommunications Access Program;⁵ (3) Emergency 911 Service;⁶ and (4) Kentucky Gross Receipts Tax Surcharge.⁷

It also is important to recognize that in addition to the Commission's general express authority to adjust specific rates outside the confines of a general rate case, these surcharges are firmly grounded in express specific statutory authority or federal court order. Moreover, the three surcharges that are based on specific express statutory authority are implemented by the Telecommunications Providers to recover the specific costs of legislatively mandated programs designed to benefit particular classes of customers. Without the ability to recover the costs of the programs through the surcharge, the programs would be unable to continue, thereby negatively impacting consumers such as low-income consumers participating in the Lifeline Program or the deaf, hard-of-hearing, and speech-impaired consumers participating in the Relay Program.

C. Implications of Limiting Rate Adjustments to General Rate Cases.

The Telecommunications Providers have not analyzed all the possible effects of a change in the existing statutory framework that would require all jurisdictional utilities to adjust their charges only through general rate cases. Still, the most obvious outcome would be that utilities would be required to file more frequent general rate cases, which likely would result in increased costs for the Telecommunication Providers and their customers, and almost certainly would result in increased demands on Commission resources. Further, as described above, it is likely that certain programs presently offered by the Telecommunications Providers would be discontinued, an outcome that would have adverse consequences for the customers presently benefiting from those programs.

D. Legislative Working Groups.

The Commission Staff and the Attorney General have raised the question of whether Chapter 278 should be amended to grant the Commission the express authority to adjust rates

⁴ This surcharge is authorized by 47 U.S.C. § 254.

⁵ This surcharge is authorized by KRS 278.547, KRS 278.549, KRS 278.5499, and KRS 163.525.

⁶ This surcharge is authorized by KRS 65.760.

⁷ This surcharge is authorized by *BellSouth Telecommunications, Inc. v. Farris*, 2007 U.S. Dist. LEXIS 13993 (E.D. Ky. February 27, 2007) and *AT&T Corp. v. Rudolph*, 2007 U.S. Dist. LEXIS 13962 (E.D. Ky. February 27, 2007).

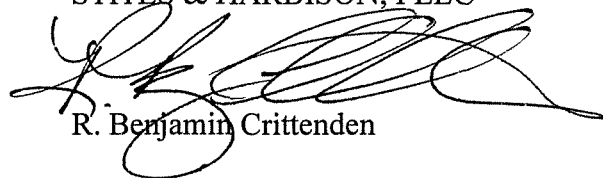
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and provide for surcharges outside a general rate case. In light of the unambiguous existing grant of statutory authority to the Commission to do just that, the Telecommunications Providers believe that any such effort would be unnecessary and premature. At a minimum, the Commission should await a final resolution of the *Stumbo v. Public Service Commission* appeals process. Approaching the General Assembly at this stage of the litigation might be misconstrued by a court as indicating the Commission presently lacks the statutory authority to adjust rates outside general rate cases.

The Telecommunications Providers appreciate the opportunity to provide the Commission with these comments.

Sincerely,

STITES & HARBISON, PLLC



R. Benjamin Crittenden